90-732 (2)

No. 90-401

Supreme Court, U.S.
FILED
NOV 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

In the Matter of
LOUIS KERLINSKY,

Petitioner

BRIEF IN OPPOSITION TO CERTIORARI

Nancy E. Kaufman
Assistant Bar Counsel
75 Federal Street
Boston, MA 02110
(617) 357-1860

November 23, 1990.

67pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant certiorari when the petitioner filed his petition for writ of certiorari more than ninety days after denial of his request for rehearing?

2. Does the petition for writ of certiorari seek review of a state court decision which has decided a federal question in a way that conflicts with applicable decisions of this Court?

PARTIES TO THE PROCEEDING

The petitioner's caption does not set forth the parties to the controversy. The respondent is the Board of Bar Overseers of the Supreme Judicial Court of Massachusetts., which is a party to this proceeding. The Bar Counsel is an officer of the Board of Bar Overseers of the Supreme Judicial Court and is the official charged with prosecution of violations of the Disciplinary Rules which govern attorneys. Constance V. Vecchione, Esq. is the Acting Bar Counsel.

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Miscellaneous

Stern, Gressman and Shapiro, Supreme Court Practice, 314-315 (6th ed., 1986). 11

DECISION BELOW

The decision below is In the Matter of Kerlinsky, 406 Mass. 67 (1989). The copy of this decision is reproduced in the petition for certiorari.

On November 27, 1989, the petitioner moved for rehearing before the state court. On November 30, 1989, the Massachusetts Supreme Judicial Court denied petitioner's request for rehearing. On December 5, 1989, Bar Counsel requested clarification of the portion of the court's decision pertaining to the computation of interest. The court issued an order clarifying the means to compute interest in September 4, 1990.

Attached to this brief are a photocopy of petitioner's petition for rehearing, the notice to the parties of the denial of the petition for rehearing, and Bar Counsel's Motion for Clarification, none of which were appended to petitioner's brief. The state court's orders of August 16, 1990 and September 4, 1990 in response to

Bar Counsel's Motion for Clarification are appended to petitioner's brief.

STATEMENT OF THE CASE

The Massachusetts Supreme Judicial Court's decision In the Matter of Kerlinsky, 406 Mass. 67 (1989), appended to the petition for writ of certiorari, sets forth the facts and law pertinent to the appeal. The petitioner's statement of facts strays from the findings of the court in claiming, incorrectly, that the parties did not dispute the fair value of petitioner's services and that the petitioner had not withheld funds from his client which indisputably belonged to the client. The petitioner's departures from and elaborations upon the state court's decision are based entirely upon his view of the evidence--a view rejected by the hearing committee of the Board of Bar Overseers which made the findings of fact, the board, and the court.

The Board of Bar Overseers filed an information with the Massachusetts Supreme Judicial Court recommending that the petitioner be required to make restitution to the estate of his by then deceased client and that the petitioner be publicly censured. The matter came before a single justice of the Supreme Judicial Court on January 11, 1989.

After hearing, the single justice issued an order on February 21, 1989 which required (1) that the petitioner turn over to the estate funds the petitioner continued to hold in trust for the decedent, (2) that the petitioner refund to the estate $3,750.00, which was the fee he had charged in excess of that agreed upon in the contingent fee agreement between the petitioner and the client; and (3) that the petitioner pay interest on the funds at a rate computed pursuant to Mass. G. L. c. 221, §51. Upon verification that all sums were paid, the court would enter an order publicly censuring the petitioner.

The petitioner appealed the decision of the single justice to the full court on March 7, 1989. On November 13, 1989, the court upheld the decision of the single justice in the decision appended to petitioner's application for writ of certiorari.

The petitioner applied for rehearing on November 27, 1989. The petition for rehearing was denied on November 30, 1989.

On December 5, 1989, the petitioner tendered funds to the estate which he contended satisfied the terms of the court's decision. Bar Counsel disputed the petitioner's calculation of the interest due. Bar Counsel then filed a request for clarification and further instructions as to the proper calculation of interest as intended by the court in its order.

On September 4, 1990, the court issued an order identifying the statute which set forth the legal rate of interest to be used in calculating the amounts due and restricting the application of

interest due under Mass. G. L. c. 221, §51, to the excess fee collected.

Petitioner made application for a writ of certiorari on November 5, 1990. The petitioner had not applied for extension of the time to file a petition. (U.S.C., Title 28, Sec. 2101(c) and Rule 13 of this Court). His appeal is confined to the matters decided by the state court on November 13, 1989.

SUMMARY OF THE ARGUMENT

1. The petitioner was required to apply for a writ of certiorari within ninety days of the state court's denial of his petition for rehearing. The Bar Counsel's motion for clarification and further instructions was confined to the question of calculating the amount of interest due and did not require or result in any substantive changes of the court's decision. Consequently, the time for filing the application began to run on November 30, 1989,

the date petitioner's request for rehearing was denied by the state court.

2. The decision appealed from does not decide any federal question but determines whether the petitioner's conduct violated state standards of professional conduct. It was forseeable that the misconduct found would result in a disciplinary sanction.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO GRANT CERTIORARI BECAUSE THE APPLICATION WAS NOT TIMELY FILED.

A petition for a writ of certiorari from a state court judgment must be filed within 90 days after the entry of the judgment. Rule 13.1. The time for filing the petition is extended if there is a timely request for rehearing of the questioned decision or if the court revises the judgment. Rule 13.4. In this case, the petitioner timely filed a petition for rehearing, and the state court denied it on

November 30, 1989. Petitioner therefore was required to file his petition for a writ of certiorari ninety days after November 30, 1989.

The Bar Counsel's motion for clarification, which requested that the court explain the portion of its decision requiring restitution with interest, did not extend the time for filing a petition for writ of certiorari. The court was not requested to revise or withdraw its decision of November 13, 1989. The court's clarification of September 4, 1990 dealt only with the issue of interest and did not revise its decision of November 13, 1989. The time for filing the writ would have been affected only if the state court had substantively changed or revised its decision as a result of the motion for clarification. F.T.C. v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952); Stern, Gressman, and Shapiro, Supreme Court Practice 314-315 (6th ed., 1986).

The petition for writ of certiorari challenges only the decision rendered on November 13, 1989. It

in no way questions the court's determination that Mass. Gen. L. c. 231, §6C, establishes the legal rate of interest referred to in Mass. Gen. L. c. 221, §51. The time for filing the petition therefore expired ninety days after November 30, 1989, the date the state court denied petitioner's request for rehearing.

II. THE MASSACHUSETTS COURT'S DECISION DID NOT DECIDE A QUESTION OF FEDERAL LAW OR CONFLICT WITH ANY DECISION OF THIS COURT.

There is no claim that petitioner was not provided with notice of the claims of misconduct prior to the hearing. Instead, the petitioner complains that he was not aware at the time he unilaterally decided to take from his client's recovery extra funds to pay himself for an appeal that he would be violating his professional obligations under the Canons of Ethics and Disciplinary Rules of the Supreme Judicial Court set forth in S.J.C. Rule 3:07, as appearing in 382 Mass. 768 (1981).

The petitioner's good faith or lack thereof in claiming he was entitled to an additional noncontingent fee for his work on the appeal was a question of fact for the hearing committee to resolve. The hearing committee simply refused to accept the petitioner's testimony as to the events that had transpired between him and his client. In the Matter of Kerlinsky, 406 Mass. at 70 (hearing committee did not accept Kerlinsky's testimony that client agreed orally to paying him a noncontingent fee for the appeal).

Moreover, the petitioner should have known that his conduct was unprofessional. The findings of fact established that the petitioner (1) breached a written fee agreement that he had drafted with the client by claiming as his own a larger share of a personal injury settlement than was provided for in the agreement, (2) withheld from the client's share of the settlement and eventually claimed as his own funds to pay expenses in unrelated cases and funds

which the petitioner was personally obligated to pay another lawyer who had been discharged from the case, and (3) withheld from the client the client's share of the settlement because the client refused to pay disputed fees in unrelated cases which had not been settled and then claimed those funds as his own. 406 Mass. at 35-39. Responsible members of the professional "can be assumed to know" that such conduct will not be acceptable. In re Ruffalo, 390 U.S. 544, 555 (1968) (White, J., concurring).

There is no federal law or right implicated by the state court decision, nor has the state court transgressed any decision of this Court. The decision to censure the petitioner was based on the facts as found by the hearing committee. There is no basis for issuing a writ of certiorari.

CONCLUSION

For the above-stated reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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Boston, MA 02110
(617) 357-1860

November 23, 1990

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LOUIS KERLINSKY
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November 20, 1989

Honorable Chief Justice Liacos
Supreme Judicial Court
1412 New Courthouse
Pemberton Square
Boston, MA 01208

Matter of: Louis Kerlinsky, SJC - 5056

Dear Sir:

Please consider this a Petition for Rehearing in the above matter. Chief Justice Liacos asked Assistant Bar Counsel at the argument of this case whether there had ever been a case interpreting the 1965 fee contract set forth in Rule 3.05, and was told "No". He asked whether there was a finding that appellant had acted in bad faith in claiming his fees, and was told "No".

There is no legal precedent in this matter in Massachusetts or elsewhere to warrant publicly censuring the appellant and to, in effect, fine him for litigating his right to obtain fair payment for his legal services for an appeal, and the Court cites none.

I. It violates the right to due process of law to impose punishment on one where there is no clear prior notice that he may be committing a wrong. Commonwealth v. Klein 372 Mass 823, 830 (1977) There is no question but that attorney discipline proceedings are subject to due process scrutiny. In re Ruffolo 390 U.S. 544 (1968)

In, In re Corboy 528 N.E. 2d 694, 701 (Ill. 1988) where the attorney gave a gift of money to a judge's wife, the Illinois Supreme Court held that there was no basis for imposing sanctions because there was lack of precedent for doing so. Ex post facto imposition of punishment is violative of the

U.S. Constitution, Article 1, Section 9 CL3 and Article 1, Section 10, Clause 1. Although this case does not deal with any statute, the fundamental principle involved is the same. No punishment should be imposed unless there is a clear prior "warning" of a violation. Commonwealth v. Cass 392 Mass 799, 467 N.E. 2d 1324, 1327 (1984) Here there was no such clear prior notice and the Court's opinion cites none. If punishment is imposed by ex post facto law, who will be safe? And who will challenge it?

II. It is unfair to omit from the Court's decision the primary issue Appellant litigated and the authorities and portions of the record on which he relied.

IIa. Case law in a number of states supports appellant's position that he was entitled to extra pay for his extra work, and especially the work of an appeal, and that the contingent fee agreement

terminated after trial and before an appeal. Slepin v. Beck 145 N.Y.S. 2d 530 (1914); "It would certainly be a surprise to the profession, and perhaps a greater surprise to their clients, to be told that an attorney, by virtue of his original retainer to prosecute or defend an action, had authority to take and prosecute on appeal from judgment rendered in the action. Of course, he has no such authority." Vitale v. Lecour 459 N.Y.S. 2d 881 (1983) "the retainer agreement made no reference to an appeal.... appellant would not have been required to prosecute the appeal.... and procedurally the attorney-client relationship terminates following trial." See also Hey v. Simon 93 S.W. 50, Union Bank & Trust of Helena v. Penwell 42 P2 457 and cases cited therein.

Bar Counsel had the burden of proving that there was a prior warning or basis for imposition of punishment or sanctions.

IIb. There was no evidence that any canon was violated as there was no evidence that "a lawyer of ordinary prudence experienced in the area of law involved, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." DR2-106B, No lawyer experienced in the area of law involved testified to such a conviction, and the decision makers are not authorized to be "silent witnesses as well as judges." Arthur v. Board of Registration 383 Mass 299, 307 (1981) No such firm conviction reasonable could exist in the absence of precedent. Nor was there one case presented where discipline was imposed on an attorney in similar circumstances anywhere in this country or elsewhere.

IIc. The record is very clear that there was no finding of any wrongful intent, fraud, bad faith, dishonesty of any kind involving the client. This

case is primarily a dispute as to the right to claim an additional fee for the additional work of an appeal.

IId. The Court's opinion omits mention of the essential facts and is misleading. It therefore casts appellant's acts in an untrue light. It is undisputed that the fair value of the appellant's legal services for the appeal alone was about $15,000.00R. Ex. 19. It is also undisputed and clear from the record that the appellant claimed additional monies for the additional work of the appeal from the very first discussion with the client regarding his remittance. See Reply Brief P. 15. In view of the claim for additional services for the appeal, there were never any "undisputed portion of the recovery".

The court apparently bases its decision to impose sanctions, on the assumption that there was an "undisputed" portion of the recovery which the

appellant unreasonably refused to pay to the client. This is completely contrary to the record S.A. 10, 12, 22, 23, TR2. P 32-36. The statement of the facts in the Court's opinion should so state in all fairness. Apparently overlooked by the Court is the portion of the transcript of the hearing annexed to the Reply Brief of the appellant wherein the attorney for Calvanese, who represented him a the outset, acknowledged the appellant had claimed a fee apart from the contingent fee agreement for the appeal; and that the appellant "expected to be paid for that appeal in addition to and separate from any contingent fee for simply handling the case and the trial", (transcript page 32); and that the communications with the attorney for Calvanese were "settlement talk," (transcript page 35); For the Court to construe settlement discussions as an indication that there was an "undisputed portion of the recovery," does not comport with the record, it

is respectfully submitted, and is contrary to the explicit testimony in the record, not only of the appellant, but also of Calvanese and his attorney. Calvanese's attorney acknowledged that he was informed that even with a 1/3 contingent fee, adding an amount for the appeal fee could reach a total in excess of the $22,500.00 settlement, (transcript page 35.) The fact that the appellant initially gave Calvanese a check for $6035.82, which he accepted temporarily, and undertook to pay some doctors' bills in unrelated matter as requested, should not be construed as an agreement on the part of the appellant that the fair value of his services for the appeal was less than the undisputed $15,000.00 claimed. Offers of settlement are not admissions of liability, nor admissions that certain sums are owed.

This is not a matter of interpreting the evidence and the controlling facts. It is

respectfully submitted that the statement of facts stated in the opinion as written by the Court gives the impression that the appellant was only claiming the difference between the 33 1/3% and 50% as his fee for the appeal, or $3750.00. There is no basis in the record for such a conclusion.

It is respectfully submitted the decision in Calvanese v. Babcock Co 10 Mass. App. Ct 726 (1980) fairly indicates that over nine issues were briefed and the record indicates that the appellant filed a brief of 70 pages pertaining to a 9 day trial. Not even a lay person would consider that $3750.00, or even twice that much, would adequately pay for the services of an attorney in an appeal in a products liability case in those circumstances.

The fundamental problem here appears to be that the Court, based on the proposed initial offer of settlement of $6035.82 made by the appellant concluded that he withheld an "undisputed" portion

of money to which Calvanese was entitled, a violation of a canons. But offering a settlement does not make the offered amount an "undisputed" amount.

And more fundamentally, a violation of a canon does not occur when an "undisputed portion" of a client's funds is withheld. A violation occurs when money to which the client is clearly entitled is withheld. Canon 9-DR 9-102 B (4) is clear that the attorney's obligations to the client is to pay over monies "in the possession of the lawyer which the client is entitled to receive." Whether the amount involved is "disputed" is irrelevent. The question is whether the client is clearly entitled to the funds; and the answer is that the client would not have been entitled to the funds had the Court construed the contingent fee agreement to terminate at the conclusion of the trial in accordance with Slepin v. Beck, supra and many other cases, and in

accordance with the understanding of attorneys "experienced in the area of law involved."

It is not for naught that his provision in the canons were enacted. It is absolutely clear that there was no testimony from any such attorney and no evidence that an experienced attorney in the area involved would have a "definite and firm conviction that the fee is substantially in excess of a reasonable fee".

Attorneys experienced in the area of the law involved are aware of decisions such as Slepin v. Beck where the Court clearly states that retaining an attorney for services on appeal is "for a new and different employment". Slepin v. Beck 145 N.Y.S. 530, 531 (1914) This has been the understanding of attorneys for many generations apparently. As the Slepin court indicates, this Court's decision will "certainly be a surprise to the profession and perhaps a greater surprise to their clients."

What this Court is now ruling is apparently based on the Knight case, a Missouri intermediary court decision in which the terms of the agreement involved are not described. The Knight court said its rule derived from cases reported in 13 ALR 3d 673, 677-680 (1985). However, the ALR article does not set forth any such rule. The cases cited by the Court are clearly distinguishable as set forth in the Reply Brief of appellant at page 18 etseq. The Missouri court concluded therefrom that there was a "general rule" that a contingent fee contract includes work done on an appeal. However the cases relied on by that Court did not state any "general rule" and turned on the particular facts in those cases. They are cases which the appellant distinguished and discussed at page 27 of his brief.

The Court's ruling at page 9 of its decision that "the 33 1/3% cap on compensation in the agreement is to be construed as including payment

for the rendition of all legal services, both trial and appellate, necessary to bring the claim to a final conclusion," is the first promulgation of such a decision in this Commonwealth, and apart from perhaps the Knight case, depending on what its agreement was, is apparently the first such decision anywhere.

The Pocius case cited by the Court involved an agreement whereby the attorney was "to perform such legal services as was necessary for my claim." There is no such agreement here and there is no such agreement in the standard form used by perhaps Thousands of attorneys in the Commonwealth. The Laughlin case cited by the Court does not describe the terms of the agreement there, and Justice Burger dissented stating that an additional fee was due for the appeal in that case. Cases which do not set forth the terms of the agreement being construed cannot be used as precedent in this case, it is respectfully submitted.

The Knight case was not decided until 1984 and apparently was reported after the appellant in this case had obtained a full release from the Calvanese estate up on the payment of $8700.00, which was agreed to after consultation with independent counsel.

In addition, apparently the Court assumes that an agreement to render services on appeal, after a trial under a contingent fee agreement, must also be on a contingent fee agreement. The hearing committee specifically found that there was no contingent fee agreement for the appeal. There is no requirement yet that non-contingent fee agreements be in writing or be part of the contingent fee agreement required by Rule 3:05.

While hindsight now teaches that all agreements with clients must be in writing for the attorney's protection more than the clients, this will do nothing for the development of the mutual feeling of

respect and trust which should prevail between client and attorney and will breed a distrustful, uneasy relationship between them.

The decision in this case that the 33 1/3% cap on compensation in a contingent fee agreement is to be construed as including payment for the rendition of "all legal services, both trial and appellate, necessary to bring the claim to a final conclusion" is contrary to the large body of existing law and the understanding of experienced lawyers in this field, that the contingent fee agreement ends after trial.

For the appellant to be punished because of the Court's new ruling without prior notice is unfair, it is respectfully submitted, and violative of the constitutional right to due process of law.

The Bar Counsel's brief at page 30 states: "the contingent fee agreement binds the attorney to take

all steps necessary to conclude successfully the client's case and that those steps necessarily include services on appeal." Will attorneys be deemed to have violated the canons if they fail to take "all steps" necessary to conclude "successfully" a client's case? If it is necessary to appeal or to defend an appeal "to bring the claim to a final conclusion, " then attorneys breach their contract and commit malpractice by failing to do so.

Even if attorneys are not required to appeal, there will be a disincentive to appeal as the agreement is construed to include services on appeal. Clients who refuse to agree to a supplemental payment will claim that the fee agreement provided by the SJC Rule requires an appeal whether the amount in controversy and the likelihood of success warrants one or not.

III. "The mere finding that a position advanced was frivolous must not be cause for discipline of the attorney." In re Bithoney 486 F2d 319, 322 (1st. Cir.)

No one should be penalized for making a reasonable, or even unreasonable, interpretation of a written contract based on precedent where the contract is set forth in a Court Rule, has not been construed by any court, and the term "legal Services" in it is not defined therein. To penalize an attorney for vigorously asserting a reasonable position based on law will ultimately weaken the legal system and bring disrespect for the law and the courts.

IV. This decision vitally affects the legal profession. Far from increasing respect for the legal process, it is respectfully submitted that this decision will be viewed by members of the bar and public as clear notice that fee disputes are

ultra hazardous for attorneys and may lead to windfalls for clients even after they have given a release and made false claims against their attorney. Clients will be encouraged to dispute fees and make false claims to the Board at no expense. How many attorneys will now be willing to defend themselves?

V. It is respectfully submitted that the appellant's conduct should not be portrayed in an inaccurate light.

Settlement with Calvanese's initial attorney could not be made as Calvanese falsely claimed that appellant had not accounted for the Faulkner settlement. There was no indication that Mr. Blumberg had relinquished his interest in the case until 1986 long after the 1984 release.

The Court also rules, without mentioning Restatement of Contracts that the "principle that any obscurities in the agreement will be taken

against the attorney who drafted it" is applicable. Again this is unprecedented in view of Restatement of Contracts, 2nd, Section 206, "The rule that language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law as is sometimes true with respect to insurance policies, bills of lading and other standardized documents". Here the contingent fee form is a standardized document." In addition, there are a number of Massachusetts cases cited in Appellant's brief at page 29 through 30, to the same effect, which the Court does not mention. Appellant should not be sanctioned for relying on the above cases and the Restatement, at least without stating in the decision the authorities on which he relied.

A. The Court's statement that the agreement to divide fees with Mr. Blumberg constitutes a violation DR2-107A1 is again an unprecedented

interpretation of DR2-107A1 which talks about "division" of fees and was not an "agreement to divide" fees. As the decision points out, there was never any division of fees in this case. Nor is there any basis for concluding on this record that Mr. Calvanese did not understand that there was going to be a division of fees between the appellant and Mr. Blumberg. The hearing committee did not find that respondent divided any fee for legal services with another lawyer, Nor did it find that client did not " consent to employment of the [other lawyer] without a full disclosure that a division of fees will be made". Findings of fact A43-55.

Nor was there any "blank space" in the fee agreement as the Court states at P.8. See B.C. Ex 7 and Appellant's Brief appendix "C". Nor was the agreement with Blumberg for 16 2/3% of a 50% fee as the Court states. See Reply Brief P. 10,11.

B. The refusal to turn over funds which appellant initially retained to pay medical bills and Mr. Blumberg, did not constitute violation of any canon. If he were entitled to a fee for the appeal, then Calvanese would not be entitled to these funds. The Bar Counsel and Board in 1981 dismissed Calvanese's complaint as a fee dispute and thereupon all withheld funds were placed in a separate trustee account. It is misleading and defaming for the opinion not to so state.

C. Nor would there be any violation of DR9-102B4 " which requires a lawyer to deliver promply to a client property which the client is entitled to receive", if appellant was entitled to a separate fee for the appeal.

Thus the entire basis of the court's decision that there were violations is founded on the conclusion that the appellant was not entitled to

claim an additional fee for the appeal in view of the contingent fee agreement. This is new law, of which the appellant had no notice. Therefore his conduct did not warrant the imposition of a sanction.

As the hearing committee found that " the appellant has been prejudiced in presenting his defense to the petition because [of] delay in bringing this matter to hearing," it is respectfully submitted that the Court's conclusion on page 12 and 13 that he was not so prejudiced has no basis in the record and is contrary to the hearing committee's own finding of fact. There would be no prejudice if the hearing committee concluded that there were no violations. To hold, as the opinion does at page 13, that the fact finder found against the attorney so therefore there was no prejudice is to engage in circular reasoning, it is respectfully submitted. Because the appellant was prejudiced in his defense

is why the decision went against him, it is respectfully submitted. The Court certainly would not hold that a lower court did not err in excluding evidence because, based on the admitted evidence, its conclusion was sound. To rule that laches is inapplicable because the finding was against appellant begs the question, it is respectfully submitted. The committee found funds were retained which were clearly not his, because "he has been prejudiced in his defense." (and because it applied incorrect principles of law to conclude the fee agreement had not terminated after trial. Existing law, including that stated in Slepin v. Beck, was incorporated in the agreement.) To assess a penalty against an attorney without prior warning is an injustice which this Court should correct, it is respectfully submitted, especially where this Court has assessed penalties not asked for in the petition, nor recommended by the Bar of Board

Overseers, or the Hearing Committee, in a case where the Hearing Committee specifically found that the appellant was prejudiced in his defense by delay not attributable to him.

Finally in regard to the discipline to be imposed, the cases cited by Bar Counsel involved fraud, dishonesty and embezzlement, etc. This is not such a case. In recorded decisions of the SJC even attorneys who misappropriated funds did not receive the sanction imposed here. See In the Matter of Disciplining Attorneys 392 Mass 827 830 (1984), and cases cited. Where there was no "wrongful intent", only a private reprimand was imposed particularly where the court had never spoken to the subject before. Here there is no evidence of "wrongful intent."

The imposition of interest from August 1981 due to delay by the Board is completely disproportionate to the alleged offense. It is likewise unprecedented as there is no finding that this is

anything other than an "honest controversy." Guenard v. Burke 387 Mass 802, 806 (1982)

Here the position advanced was not frivilous but was based on precedent in circumstances where there was no Massachusetts legal precedent to the contrary.

It is respectfully requested that the court amend its opinion to fairly state the facts and the position of the appellant as stated herein with the authorities on which he relied. Apparently the court has overlooked portions of the record set forth above.

In addition, the appellant respectfully requests the Court to stay the execution of payment in this case until 10 days after the disposition of this petition for rehearing, and that there be en banc rehearing. Respectfully Submitted.

The Appellant

/s/Louis Kerlinsky
Louis Kerlinsky

LK/dmc
0541D

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served on all parties by mailing a copy hereof.

/s/Louis Kerlinsky
Louis Kerlinsky, P.C.

Cert. Mail #P-102-306-559

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108

(617)725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

November 30, 1989

Louis Kerlinsky, Esquire
31 Elm Street
Springfield, MA 01103

Dear Attorney Kerlinsky:

RE: SJC-5056
IN RE: LOUIS KERLINSKY

Your Petition for Rehearing of the above-captioned appeal has been considered by the Court and was denied.

Very truly yours,

/s/Jean M. Kennett
Jean M. Kennett,
Clerk

CC: Nancy E. Kaufman, Esquire
Board of Bar Overseers
11 Beacon Street
Boston, MA 02108

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR

THE COMMONWEALTH OF MASSACHUSETTS

S-5056 SJC

MATTER OF LOUIS KERLINSKY

MOTION OF BAR COUNSEL FOR
CLARIFICATION AND FURTHER INSTRUCTIONS

Bar Counsel hereby moves this Honorable Court to clarify its decision rendered in the above-captioned matter and to issue further instructions to the parties. As grounds for this motion, Bar Counsel represents as follows.

On November 13, 1989, the Court issued an Order affirming the Order of the Single Justice entered in Matter of Louis Kerlinsky, No. 89-38BD. The Order of the Single Justice, entered on February 21, 1989, provided as follows:

> (1) Louis Kerlinsky shall with ten (10) days pay over to the legal representatives of the Calvanese Estate the funds he was holding as Trustee for Joseph Calvanese at the Bank of New England-West, plus $3,750.00, with interest from August 21, 1981, said interest to be computed pursuant to G. L. c. 221, §51, the latter sum representing the fee charged by the respondent in excess of 33 1/3% of the Babcock recover. (2) Upon verification that said money has been paid, Judgment shall enter publicly censuring Louis Kerlinsky.

The rescript has issued. No order of discipline has entered.

On December 5, 1989, Mr. Kerlinsky contacted Assistant Bar Counsel by telephone to advise that he intended to deliver to Bar Counsel a cashier's check

for $7,003.24, representing the remainder of the funds held in the trust account, and $12,184.38, representing the $3,750.00 plus interest since August 21, 1981. Mr. Kerlinsky explained that these sums did not include penalty interest on the funds he had held in escrow and that he had assigned 6% as the legal rate of interest to be multiplied by the penalty rate set forth in G. L. c. 221, §51, on the amount of his excess fee of $3,750.00. Mr. Kerlinsky justified his use of 6% by referring G. L. c. 107, §3, and to a case at "496 N.E. 2d 456".

Bar Counsel disputed the respondent's calculation of interest due. Bar Counsel advised the respondent that he erred in not applying the penalty provisions of G. L. c. 221, §51, to the funds held in trust for Louis Calvanese. In addition, in calculating the penalty rate of interest to be applied to the $3,750.00 overcharge, the respondent erred in multiplying by five the 6%

rate of interest set forth in G. L. c. 107, §3. Instead, the respondent should have used the rate of interest set forth in G. L. c. 231, §6C, according to the relevant time periods, which would have, when multiplied by the penalty, yielded a rate of interest of 50% for 314 days and 60% for 2,676 days. Using Bar Counsel's calculations, the respondent owed $54,096.82 to the estate of Joseph Calvanese.

On or about December 12, 1989, Mr. Kerlinsky forwarded to Bar Counsel a cashier's check for $7,003.21, issued by the Bank of New England, and a second check drawn on his attorney at law account in the amount of $12,184.35 (for a total sum of $19,187.56), both payable to Angelina Calvanese, Administratrix. Bar Counsel forwarded the checks on December 13, 1989 to an individual then authorized by Angelina Calvanese to receive the checks.

Bar Counsel and the respondent were unable to resolve the dispute over proper calculation of the sums due from Mr. Kerlinsky to the estate of Joseph Calvanese. Bar Counsel brought the dispute to the Court's attention by letter dated December 7, 1989. (Attachment A). On December 14, 1989, Mr. Kerlinsky submitted to the Court his position on the proper calculation of amounts due under the Order. (Attachment B). On January 26, 1990, the Clerk of Courts advised Assistant Bar Counsel that the December 7, 1989 letter had not been docketed. Bar Counsel resubmitted his request for clarification. On June 26, 1990, the Clerk of the Court advised Bar Counsel to file a formal motion.

As support for his position that Mr. Kerlinsky has not complied fully with the restitution ordered by the Court, Bar Counsel relies on the arguments set forth in his letter to the Court dated December 7, 1989 and attached hereto as Attachment A. Mr.

Kerlinsky's position is set forth in Attachment B. The Order of the Single Justice, which was ratified by the full Court in its decision, requires verification of full restitution prior to entry of an Order of public censure. There has been, to date, no entry of an Order of public censure.

WHEREFORE, the Bar Counsel requests that the Court:

1. Consider the matter set forth herein.
2. Clarify its Order of November 13, 1989 as to (a) whether interest owed together with the penalty as set forth in G. L. c. 221, §51, applies to both the excessive fee of $3,750.00 and the $11,200.00 wrongfully placed in trust by Mr. Kerlinsky, (b) whether G. L. c. 107, §3, or G. L. c. 231, §6C, provides the legal rate of interest to which the penalty provisions of G. L. c. 221, §51, apply, and (c) whether interest

and the penalty on interest continued to accrue after the date of the Order of the Single Justice, and if so, to what date.

3. Clarify the conditions which Mr. Kerlinsky must fulfill prior to the entry of the Order imposing discipline.

Respectfully submitted,
DANIEL KLUBOCK
BAR COUNSEL

By /s/Nancy E. Kaufman
Nancy E. Kaufman
Assistant Bar Counsel

Dated this 29th day of June, 1990.

OFFICE OF THE BAR COUNSEL
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December 7, 1989

The Honorable Jean M. Kennett
Clerk
Supreme Judicial Court
for the Commonwealth
Room 1412
Court House
Boston, MA 02108

RE: S.J.C.-5056
In re Louis Kerlinsky

Dear Ms. Kennett:

This letter is intended as a request to the Court for clarification of its decision in the above-captioned matter.

ATTACHMENT A

On November 13, 1989, the Court issued an Order affirming the Order of the Single Justice entered in Matter of Louis Kerlinsky, No. 89-38BD. The Order of the Single Justice, entered on February 21, 1989, provided as follows:

> (1) Louis Kerlinsky shall within ten (10 days pay over to the legal representatives of the Calvanese Estate the funds he was holding as Trustee for Joseph Calvanese at the Bank of New England-West, plus $3,750.00, with interest from August 21, 1981, said interest to be computed pursuant to G. L. c. 221, §51, the latter sum representing the fee charged by the respondent in excess of 33 1/3% of the Babcock recover.
>
> (2) Upon verification that said money has been paid, Judgment shall enter publicly censuring Louis Kerlinsky.

On December 6, 1989, Mr. Kerlinsky contacted me by telephone to advise that he intended to turn over to Bar Counsel for delivery to Angelina Calvanese, the representative of the Calvanese estate, a chashier's check for $7,003.24, representing the remainder of the funds held in the trust account, and $12,184.38, representing the $3,750.00 plus interest since August 21, 1981. Mr. Kerlinsky stated that he had assigned 6% as the legal rate of interest due solely on the amount of $3,750.00 and had calculated the interest due on the funds at 30%. Mr. Kerlinsky justified his use of 6% by referring G. L. c. 107, §3, and to a case at "496 N.E. 2d 456".

Mr. Kerlinsky did not apply the penalty provisions contained in G. L. c. 221, §51, to the funds in the trust account. The checks are now in the possession of the Office of Bar Counsel.

Bar Counsel reads the Order of the Single Justice and the Order of the full Court to require that legal rate of interest and the penalty provisions of G. L. c. 221, §51, be applied to the repayment of all funds, including the funds wrongfully withheld from the client by deposit to the trust account. Bar Counsel's interpretation is consistent both with the terms of the statute, which applies the penalty to funds the attorney "unreasonably neglects to pay over" to the client, and the decision of this Court that the respondent wrongfully withheld the funds in the trust account from the client and his estate. The client was equally deprived of both the $3,750.00 taken in an excessive fee and the $11,200.00 which the

respondent deposited to a trust account. There is no obvious reason why the $11,200.00 should be exempt from the legal rate of interest and the provisions of G. L. c. 221, §51.

Bar Counsel also disputes Mr. Kerlinsky's contention that G. L. c. 107, §3, establishes the legal rate of interest in this matter. That statute provides that "[i]f there is no agreement or provision of law for a different rate, the interest of money shall be at the rate of six dollars on each hundred for a year...." G. L. c. 107, §3, does not govern cases where the claimant had been deprived of funds due him. The relevant statue is G. L. c. 231, §6C, which provides in pertinent part as follows:

> In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the

> court to the amount of damages, at the contract rate, if established, or at the rate of twelve per cent per annum from the date of the breach or demand....

This Court held in Sterilite Corp. v. Continental Casualty Co., 397 Mass. 837, 841 (1986) that G. L. c. 231, §6C

> "is designed to compensate a damaged party for the loss of use or unlawful detention of money." An award of interest is made "so that a person wrongfully deprived of the use of money should be made whole for his loss". [Citations omitted].

Matter of Kerlinsky involves the unlawful withholding of funds from a client due to the

respondent's breach of the 1965 contingent fee agreement and his wrongful confiscation of the client's share of recovery. Therefore, G. L. c. 231, §6C provides the legal rate of interest due on those funds wrongfully withheld from the client. In Cannon v. Fahey, 327 Mass. 245 (1951), this Court held that an action to recover funds an attorney collected for a client was, in essence, "an action of contract". Id. at 246. Cannon also upheld the application of the penalty provided for in G. L. c. 221, §51, as payment "incidental to the debt...." Id. at 246. Reference to G. L. c. 231, §6C is also supported by Matter of Toscano, No. 86-16BD, slip op. at 2 (May 6, 1987), where the Single Justice entered a Judgment accepting an affidavit of resignation in lieu of disbarment and ordering that no petition for reinstatement would be considered unless the petitioning attorney had made full

restitution of all funds, "plus interest on these sums (see G. L. C. 231, §6C).[1]

The legal rate of interest established by G. L. c. 231, §6C, is 10% from August 21, 1981 to July 1, 1982 and 12% from July 1, 1982 to the present. Thus, Mr. Kerlinsky properly owes the sum of $3,750.00, with interest at 50% from August 21, 1981 to July 1, 1982 and interest at 60% from July 1, 1982 to the date of payment. In addition, he owes the estate $11,200.00 with interest at the rate of 50% from August 21, 1981 to July 1, 1982 and interest at the rate of 60% from July 1, 1982 to the date of payment.

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[1]Mr. Kerlinsky's reliance on Robbins v. Robbins, 22 Mass. App. Ct. 982, 984, 496 Mass. 456, 458 (1986) for his claim that G. L. c. 107 §3, established the rate of interest is misplaced. Robbins stands for the proposition that interest on an award of counsel fees to the wife is calculated at the rate of 6% because the husband's duty to pay the fee does not arise from a "'contractual obligation'" but rather from an order of the Probate Court.

Bar Counsel has asked the chief financial investigator in his office to calculate the amounts owed to the Calvanese estate at the above-stated interest rates assuming the commencement date of August 21, 1981 and payment made on December 5, 1989. The chief financial investigator assumed interest at the rates of 50% and 60% as set forth above with no compounding. Following those assumptions, Mr. Kerlinsky owes the following amounts. On the excessive fee of $3,750.00, Mr. Kerlinsky owes $21,857.36 [50% interest rate for 314 days and 60% interest rate for 2,676 days]. On the $11,200.00 withheld in trust, the respondent owes $32,239.46. The payment to the estate of $8700.00 on April 5, 1985, has been taken into account in this calculation.

Mr. Kerlinsky's calculation of $12,184.38 appears to include interest only to February 21, 1989, the date of the Order of the Single Justice. Bar Counsel's calculation of the amount due to the Calvaneses estate using Mr. Kerlinsky's assumption of a 30% interest rate applied only to the $3,750.00 yields $12,965.80, not $12,184.35, taking December 5, 1989 as the payment date. If the 30% figure is applied to the $11,200.00 amount, Mr. Kerlinsky owes the estate $17,851.33 (taking into account the payment of $8700.00 on 4/5/85).

Mr. Kerlinsky cannot avoid the accrual of interest by simply not paying the amounts ordered by the Single Justice or by taking an appeal. Moreover, postjudgment interest accrues at the same rate as prejudgment interest. Trinity Church in the City of Boston v. John Hancock Mutual Life Ins. Co., 405 Mass. 682, 683-684 (1989), citing G. L. c. 235, §8.

Hon. Jean M. Kennett

December 7, 1989

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Bar Counsel requests that the Court clarify the following matters:

1. The appropriate statute which provides the legal rate of interest to be applied in this matter.

2. Whether interest owed together with the penalty as set forth in G. L. c. 221, §51, applies to both the excessive fee of $3,750.00 and the $11,200.00 wrongfully place in trust by Mr. Kerlinsky.

3. Whether the interest and penalty interest accrues after the date of the Order of the Single Justice.

Thank you for bringing this matter to the attention of the Justices.

Very truly yours,

/s/Nancy E. Kaufman
Nancy E. Kaufman
Assistant Bar Counsel

CC: Louis Kerlinsky

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LOUIS KERLINSKY
NORMA SAXE KERLINSKY

December 14, 1989

The Honorable Jean M. Kennett
Clerk
Supreme Judicial Court
for the Commonwealth
Room 1412
Court House
Boston, MA 02108

RE:S.J.C.-5056
In Re Louis Kerlinsky

Dear Mrs. Kennett:

In response to Bar Counsel's letter of December 7, 1989, the order regarding payment of interest pertains to the $3,750 and not to the amount held in the trust account.

ATTACHMENT B

The trust account was an interest bearing account and includes interest. It was established as soon as the Bar Counsel, with the approval of the Board, dismissed the entire matter as a fee dispute in 1981. Payment of interest on interest was clearly not intended.

The order, by use of commas, makes clear that the interest is to be added to the $3,750 amount, the difference between a 50% fee and a 33 1/3% fee. If this were not so, there would be no commas after Bank of New England-West.

The clause "with interest from August 21, 1981" clearly modifies and is confined to the last antecedent, "$3,750", in accordance with the rules of construction of instruments and statutes.

The imposition of payment of "five times the lawful interest", Ch. 221 sec 51, was in effect a fine because respondent clung to an "unreasonable position". There was no fraud, theft, or dishonesty involved, nor any finding respondent had acted in bad faith. The suggestion that this fine should amount to $21,857.36 plus $32,239.46 or a total of $54,096.82, or even $17,851.33 in addition to the $19,187.62 already paid for a total of $37,038.95 is to suggest cruel and unusual punishment be exacted.

The rate of interest stated in Ch. 221 Sec. 51 is "five times the lawful interest".

The lawful interest in these circumstances is set forth in Ch. 107 Sec. 3 and Robbins v. Robbins 22 Mass. App. 932, 989, 496 N.E. 2d 456, 458. This proceeding is not an action of contract. The contract claim was settled with the claimant in 1985 and a complete release was obtained. The interest to be paid is imposed pursuant to an order of the Court as in the Robins case. This order dated

February 21, 1989 fixed the amount of the fine.

The delay in processing this matter was due in part to the fact that it was initially adjudged a fee dispute and dismissed. It was only later reinstituted when new false charges were made regarding the Faulkner settlement. The delay in processing by the Board thereafter was not due to respondent who admittedly cooperated fully.

Payment of a windfall in these circumstances in addition to the $8,700 paid in 1985, and the $19,186.62 paid on December 5, 1989, or, a total of $27,887.62, already paid, would indeed be cruel and unusual punishment of a lawyer of retirement age who had an unblemished record.

Respectfully submitted.
Very truly yours,

/s/Louis Kerlinsky
Louis Kerlinsky, P.C.

LK/vdl
12/14/89-H
CC:Nancy Kaufman
OFFICE OF THE BAR COUNSEL
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January 26, 1990

The Honorable Jean M. Kennett
Clerk
Supreme Judicial Court
for the Commonwealth
Room 1412
Court House
Boston, MA 02108

RE: S.J.C.-5056
In re Louis Kerlinsky

Dear Mrs. Kennett:

Pursuant to tour telephone conversation of this date, I am resubmitting my request for clarification of the Court's Order and Mr. Kerlinsky's response. I understand that these items do not appear on the Court docket.

ATTACHMENT C

Please advise if there are any other necessary steps to insure that this matter receives consideration.

Please not that our address is now 75 Federal Street, 7th Floor, Boston, MA 02110.

Thank you for your assistance.

Very truly yours,

/s/Nancy E. Kaufman
Nancy E. Kaufman
Assistant Bar Counsel

Encls.
CC:Louis Kerlinsky, Esq.